Supreme Court, U.S.
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No. 95-1579

In the Supreme Court of the United States

OCTOBER TERM, 1995

JOHN G. PRICE AND DAVID G. PRICE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether there was sufficient evidence to support the jury's finding that petitioners were not entrapped.

2. Whether the district court conducted an adequate hearing on petitioners' claim of juror misconduct.

3. Whether the district court acted within its discretion in excluding from evidence the Attorney General's Guidelines on FBI Undercover Operations.

4. Whether Sentencing Guidelines § 5E1.2(i), which requires the imposition of a cost-of-incarceration fine, is valid.

5. Whether the district court judge correctly refused to recuse himself from sentencing petitioners.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 24a-42a) is reported at 65 F.3d 903.

JURISDICTION

The judgment of the court of appeals was entered on September 29, 1995. A petition for rehearing was denied on January 30, 1996. Pet. App. 44a. The petition for a writ of certiorari was filed on April 1, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a second jury trial in the United States District Court for the Middle District of Alabama,

petitioners John G. Price and David G. Price were convicted on one count of conspiring to commit murder, in violation of 18 U.S.C. 371 (1988); and two counts of using interstate commerce facilities with intent that a murder-for-hire be committed, in violation of 18 U.S.C. 1958 (1988).[1] John was separately convicted on two counts under Section 1958 and on one count of soliciting the commission of a crime of violence, in violation of 18 U.S.C. 373 (1988). David was separately convicted on one count under Section 1958. John was sentenced to 360 months' imprisonment, to be followed by three years of supervised release. He was also ordered to pay $350 in restitution and a fine of $880,752.40 (including $630,752.40 for costs of incarceration and supervision). David was sentenced to 300 months' imprisonment, to be followed by three years of supervised release. He was also ordered to pay $350 in restitution and a fine of $726,712.40 (including $526,712.40 for costs of incarceration and supervision). The court of appeals affirmed the convictions but vacated the sentences and remanded for resentencing because it believed that a two-level upward departure was based in part on an invalid factor. Pet. App. 24a-42a.

1. Petitioners, John Price, and his son David, hired Bobby Price (no relation) to arrange for the murder or maiming of people whom petitioners regarded as harmful to their rubber business. Bobby revealed petitioners' plot to law enforcement authorities as part of a cooperation agreement following his arrest

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[1] Petitioners' first trial ended in a mistrial, when the jury acquitted petitioners on two counts of witness tampering, but could not reach a verdict on the remaining counts. Pet. App. 25a n.1, 29a.

on an unrelated matter. Thereafter, in a sting operation, Bobby introduced federal agents posing as hit men to petitioners, who hired the agents to carry out their plot. Pet. App. 25a-28a; Gov't C.A. Br. 4-18.

a. John was president of Price Rubber Corporation, a business headquartered in Montgomery, Alabama. David managed a Texas rubber plant owned by Price Rubber. Before establishing operations in Montgomery, John owned a rubber warehouse and distribution center in Auburn, Georgia. In 1974, that facility burned down, causing John an uninsured $3 million loss. Petitioners suspected David Hawthorne, an Auburn resident, of committing the arson, and they turned to Bobby Price, a former employee and friend of David's, to help them get revenge. Pet. App. 25a-26a; Gov't C.A. Br. 4, 6.

In November 1991, David visited Bobby's auto body shop in Montgomery and gave Bobby $2,000 to find "the right people" to kill Hawthorne and to blow up the law office of another of petitioners' perceived enemies, Leon Capouano. Later, David mailed Bobby two packages containing information on Hawthorne and Capouano. Pet. App. 26a-27a; Gov't C.A. Br. 6. One of the packages contained a note adding Sy Shafer and Kenny Price to the "hit list." Kenny was John's nephew and business associate. In 1986, Shafer had sold his printing business, Pioneer Press, to Kenny, and had hired Capouano to handle the transaction. Kenny and Shafer became involved in litigation, and by the fall of 1991, Shafer had filed two lawsuits against John Price. The relationship between John and Kenny soured, and when John fired him, Kenny became a prospective witness for Shafer against John. Pet. App. 25a-27a; Gov't C.A. Br. 4-6.

b. Meanwhile, in July 1992, Bobby Price was arrested for trafficking in marijuana. He entered into a cooperation agreement with the government, under which he disclosed information about the drug trade in Montgomery. During that time he continued to have contact with petitioners about the activities at issue in this case. Bobby did not mention petitioners to the government, however, until August 1992, when the debriefing agents asked about phone calls Bobby had made to Texas. Bobby acknowledged his arrangement with petitioners, and he agreed to assist the government in investigating them. Pet. App. 27a & n.3; Gov't C.A. Br. 6-8.

On August 14, 1992, as part of that agreement, Bobby met with David Price, who confirmed that Kenny Price and Hawthorne were still prime targets. David also took Bobby to Elmore County, Alabama, to "case" Kenny's trailer. David paid Bobby $1,500, and Bobby told David that he had two friends who would be willing to carry out petitioners' plans. Pet. App. 27a; Gov't C.A. Br. 8.

The next week, Bobby met with John Price. John graphically described how he would like his victims mutilated, and how he relished the prospect of their having to suffer for the rest of their lives. John wanted Kenny "busted up pretty good" and was at best indifferent to his survival. John also said that he had waited 18 years to take care of "that thing in Auburn," and that Hawthorne needed to be "rubbed out." Pet. App. 27a-28a & n. 4; Gov't C.A. Br. 9-10.

By September 16, 1992, Bobby had introduced David Price to his two "friends," both undercover FBI agents. Subsequently, the agents met with John Price as well. At meetings throughout the fall, petitioners planned and paid for the murders of Haw-

thorne, Kenny Price, and Shafer, and the bombing of Capouano's law office. Pet. App. 28a; Gov't C.A. Br. 11. At different times, petitioners told the agents that they had previously given Bobby Price money and therefore thought that payment had already been made. For example, at a meeting on November 10, 1992, John told the agents, "like David told you earlier, we thought we'd laid a little bread on you about a year ago." Gov't C.A. Br. 14. David also said that he had paid Bobby Price in January 1992 to have the Capouano law office destroyed. Petitioners nevertheless agreed to pay $25,000 for each murder. David gave the agents a downpayment of $2,000, to which, he said, he and his father had contributed equally. David also told the agents that his father was in charge. John told the agents that "We've been thinkin' and thinkin' and talkin' a long time" about Hawthorne, but "[j]ust didn't know anybody." John added that while he and David "may not be * * * your best account, * * * who knows, we may get big enough to have a volume discount one day." Later, John gave the agents $3,000 and a map of Auburn, Georgia, to assist them in preparing to murder Hawthorne. He gave them $5,000 to prepare for Shafer's murder. Gov't C.A. Br. 11-15.

On December 31, 1992, John sent the agents a "menu" of services for them to perform and the price he would pay for each. In January 1993, he referred to the menu in describing what he wanted done to two attorneys, Dennis Pentazis and Tim Davis, who were involved in litigation against him. John paid the agents $4,000 for "office visits" he wanted them to make to Pentazis and Davis. John also sent the agents a letter requesting the "well damaged carcass" of IRS Agent Dwight Huff, who in 1991 had

begun a two-year audit of Price Rubber's tax records. Pet. App. 26a, 28a & n.5; Gov't C.A. Br. 5-6, 10-17.

On January 27, 1993, at their last meeting with John Price, the agents announced that they had murdered Shafer, and they displayed pictures of what they said was Shafer's body. John paid the agents $20,000 and expressed enthusiasm about the imminent completion of the remaining jobs. Petitioners were arrested later that day. Pet. App. 28a; Gov't C.A. Br. 17-18.

2. a. At trial, petitioners asserted an entrapment defense. With respect to that defense, the district court instructed the jury that "[p]redisposition refers to the [s]tate of mind of a Defendant prior to the time the Government agents first approach him or her" (VIII Tr. 1388); that entrapment occurs "where the Government puts in the mind of an innocent person the disposition to commit the criminal act" (*id.* at 1387); that acquittal is required if a defendant was induced "to commit a crime that he had no previous disposition or intent to commit" (*id.* at 1386-1387); that government "[a]gents may not force the hand of a sting target into violating the law and then claim that only someone predisposed to commit the crime is capable of doing so" (*id.* at 1391); and that the Government must prove that its agents "did not induce the Defendant's criminality," *i.e.*, "that his criminal inclination did not possibly result from the seductions of Government agents" (*ibid.*). The jury found petitioners guilty of conspiring to commit murder and using interstate commerce facilities with intent that a murder-for-hire be committed. John Price was also found guilty of soliciting the commission of a crime of violence.

b. Petitioners moved for a new trial based on alleged juror misconduct. Petitioners claimed that a juror from their first trial had spoken to the second jury, and that Juror Number 10 from the second trial had told his employer that the case would not last "much longer because he and the other jurors had their minds made up." Petitioners sought permission to interview the juror from the first trial and each member of the second jury. Pet. App. 3a. While the court denied petitioners permission to interview jurors, it "conduct[ed] a full investigative hearing," questioning the juror from the first trial and every juror from the second trial. *Id.* at 3a, 11a, 21a. In addition to asking its own questions, the court asked questions submitted by petitioners and the government. *Id.* at 3a-4a.

The juror from the first trial denied speaking with the jurors from the second trial, and that denial was consistent with the testimony of the jurors from the second trial. Pet. App. 4a. Juror Number 10 "vigorously denied ever making [the] comment" attributed to him, and the court found his denial credible. *Id.* at 10a n.3. With the exception of Juror Number 4, no serious questions were raised about any of the other second trial jurors. *Id.* at 4a.

Juror Number 4 reported commenting to her husband that petitioners looked "mean." Her husband, however, could not recall such a comment and testified that her only remark about the trial was that she could not discuss it with him. Pet. App. 5a, 11a. The court found that, even assuming that Juror Number 4 had told her husband that petitioners looked "mean," there was "no reasonable possibility of prejudice" to petitioners. *Id.* at 11a. The court viewed that sort of "general, if not ambiguous, comment" as "an example

of the de minimis contact from which it is impossible to shield jurors." *Ibid.*

Juror Number 4 also testified that, during the second trial, she tried to tell the government's lead witness, an FBI agent, that she admired him for his undercover work, but that before she could do so, he told her he could not speak with her. Pet. App. 7a-8a, 18a, 19a n.5. The court found that Juror Number 4's "attempted conversation" was harmless, because she had simply "greet[ed]" the agent. *Id.* at 18a-19a. The court further found that the juror's favorable impression of the agent was "merely an objective evaluation of his testimony," and not evidence of bias. *Id.* at 19a & n.5.

Juror Number 4 also initially testified that she had made her mind up before the jury received its instructions and began deliberating. Pet. App. 5a & n. 2. Thereafter, she explained that "when we voted in there, when we went around the room I knew he was guilty and I said yes." *Id.* at 7a. The following colloquy ensued (*ibid.*):

> [THE COURT]: That's when you finally made your mind up.
>
> [JUROR NO. 4]: That's when I said. In my mind I thought it, but yes. Does that make sense?
>
> Q. Yes, ma'am. That's when you finally made your mind up when you voted.
>
> A. When I said yes.
>
> Q. Is that a fair statement?
>
> A. Yes.

The court determined that petitioners "were not prejudiced by any premature deliberations on the part of Juror [Number] 4." Pet. App. 16a. The court noted that at the beginning of the hearing she had seemed "intimidated by the proceedings," "visibly nervous," and "unsure" of the meaning of the questions put to her. *Id.* at 15a. The court found, however, that "any confusion created by her initial testimony was dispelled at the end when she testified that she finally made up her mind when she voted." *Id.* at 16a. The court further found that she had listened to and followed its instructions, and that during the trial she had "maintained an open mind" concerning petitioners' guilt or innocence, as evidenced by her vote to acquit David Price on two counts. *Id.* at 15a-16a. The court was satisfied that any conclusions she may have reached before deliberations were "objective evaluation[s] of the evidence presented" to that point, *id.* at 15a-16a, and that those preliminary conclusions were a natural and appropriate part of the process of forming an opinion, *id.* at 16a.

The court concluded that "no material misconduct occurred," and that petitioners "were not prejudiced in any way." Pet. App. 21a. Accordingly, the court denied the motion for a new trial. *Id.* at 22a.

c. At a status conference in his chambers the day before petitioners were to be sentenced, the district judge advised counsel that, about two weeks earlier, the FBI had informed him that he had been the subject of two death threats, one of which was made by John Price and the other of which was made by his son, J.W. Price. 2/9/94 Tr. 2-3. The judge added that he did not know the details, but that he was under the protection of the United States Marshal Service. *Id.* at 3. The judge informed the parties that he had

concluded that his recusal was not required, *ibid.*, and he made the following findings:

> The Court does not intend to form any opinion * * * on the sentencing in this case on any basis other than what I have learned from my participation in the case itself and * * * from the presentence reports and the briefs submitted by counsel on the matter of sentencing. I have not been involved in the Government's investigation, * * * —if there is an investigation, and I don't even know whether there is an investigation and have not asked. I did not * * * request the security of the United States Marshals, it was ordered by Chief Judge Thompson without my knowledge. I have not directed any investigative matters in the case. And I do not intend to allow the fact that I have allegedly been threatened or my life has allegedly been threatened to influence me in any way.

Id. at 3-4.

The next day, petitioners' attorneys requested the judge to recuse himself "from further proceedings in this matter for the reason that they are being sentenced for conduct similar to what the Court expressed yesterday." 2/10/94 Tr. 2-3. The judge denied the motion, *id.* at 3, and sentenced petitioners.

3. The court of appeals affirmed petitioners' convictions but vacated their sentences. Pet. App. 24a-42a.

a. The court rejected petitioners' claim that they had been entrapped as a matter of law. Observing that "[e]ntrapment is generally a jury question," the court analyzed the claim as "a sufficiency of the evidence inquiry," *i.e.*, whether "a reasonable jury [could] con-

clude that the defendant was predisposed to take part in the illicit activity." Pet. App. 31a. The court identified the elements of a valid entrapment defense as "government inducement," and "the defendant's lack of predisposition to commit the crime prior to the inducement." *Id.* at 31a, 32a. With respect to the latter element, the court held, "the government must prove beyond a reasonable doubt that 'the defendant was actually predisposed to commit the underlying crime absent the government's role in assisting such commission.'" *Id.* at 32a-33a.

Applying those standards, the court found the evidence sufficient "for the jury to conclude beyond a reasonable doubt that [petitioners] were predisposed to commit the crimes of which they were convicted." Pet. App. 33a. The court concluded that "[w]hile some statements by [petitioners] suggest hesitation to go as far as murder, there are other indications of their readiness and willingness to have their perceived enemies maimed or killed." *Ibid.* The court found it "[s]ignificant[]" that "David Price met with Bobby Price and made the first 'downpayment' for their series of 'hits' in November, 1991, long before Bobby became a government agent." *Ibid.* The court also noted that, "[i]n negotiating with the FBI agents about their fees, both John and David Price made reference to payments previously given to Bobby." *Ibid.* Based on that evidence, the court concluded that "[petitioners'] disposition arose before government agents allegedly pressured them to discuss murder." *Ibid.*

b. The court rejected as "without merit" petitioners' claims that: (1) the district court erred in denying their motion for a new trial based on juror misconduct; (2) the district court did not conduct an

adequate inquiry into the possible misconduct; (3) the entrapment instructions were inadequate; (4) the district court erred in excluding from evidence the Attorney General's Guidelines on FBI Undercover Operations; and (5) the judge should have recused himself from sentencing petitioners after learning that one of them had allegedly made death threats against him. Pet. App. 30a n.6.

c. The court also rejected petitioners' challenge to the validity of Sentencing Guidelines § 5E1.2(i), which imposes an additional fine amount to cover the costs of imprisonment and supervised release. Pet. App. 34a-36a. The court held that cost-of-incarceration fines are not excessive under the Eighth Amendment, explaining that "a fine based on a criminal's stay in prison seems to be by definition proportional to the crime committed." *Id.* at 34a n.7. The court also held that cost-of-incarceration fines do not violate due process, reasoning that it is "a rational means to assist victims of crime collectively." *Id.* at 35a-36a. For the same reason, the court held that such fines are consistent with the purposes of the Sentencing Reform Act of 1984. *Id.* at 35a-36a.

The court vacated petitioners' sentence, however, on the ground that a two-level upward departure had been based in part on what the court regarded as an invalid factor. The court therefore remanded for resentencing. Pet. App. 36a-42a.

ARGUMENT

1. Petitioners contend (Pet. 7-14) that the evidence was insufficient to support the jury's conclusion that they were not entrapped. That contention is without merit and does not warrant further review.

a. An entrapment defense "has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct." *Mathews* v. *United States*, 485 U.S. 58, 63 (1988). "Predisposition, 'the principal element in the defense of entrapment', focuses upon whether the defendant was an 'unwary innocent' or, instead, an 'unwary criminal' who readily availed himself of the opportunity to perpetrate the crime." *Ibid.* (citation omitted). In evaluating the sufficiency of the evidence on an entrapment defense, the evidence must be viewed in the light most favorable to the government. See, *e.g.*, *United States* v. *Martinez*, 979 F.2d 1424, 1430 (10th Cir. 1992), cert. denied, 507 U.S. 1022, 509 U.S. 913 (1993); *United States* v. *Ford*, 918 F.2d 1343, 1348 (8th Cir. 1990). In this case, the evidence supported the jury's conclusion that petitioners had the predisposition to commit the offenses of which they were convicted.

In November 1991, eight months before Bobby Price even mentioned petitioners to the government, David Price gave Bobby $2,000 to find "the right people" to kill David Hawthorne and to bomb the law office of Leon Capouano. David also sent Bobby a note adding Sy Shafer and Kenny Price to the hit list. After Bobby's drug arrest in the summer of 1992, David Price confirmed to him that Hawthorne and Kenny Price were still prime targets, took him out to "case" Kenny's trailer, and paid him an additional $1,500 for the desired introductions. After also meeting with John, Bobby introduced petitioners to "the right people." While David was the person who contacted Bobby Price, John Price was in on the scheme from its inception. In fact, David told the agents that John was in charge. John also admitted that he had been

planning to take revenge on Hawthorne for 18 years, and told agents that he thought he had already "laid a little bread on you about a year ago"—a reference to the $2,000 that David paid Bobby Price in November 1991. Petitioners willingly met with the agents and they instructed the agents on exactly what they wanted done to each victim. They also supplied the agents with a "menu" of services to be performed, and joked that they would provide enough work to warrant a "volume discount." The evidence therefore amply established petitioners' predisposition to commit the crimes of which they were convicted.

b. Petitioners argue (Pet. 8-13) that the court of appeals' decision conflicts with *Jacobson* v. *United States*, 503 U.S. 540 (1992), because the court in this case inferred petitioners' predisposition from their ready commission of the offense, and *Jacobson* precludes such an inference.

In *Jacobson*, the Court reaffirmed that a defendant's ready commission of an offense will often be sufficient to establish predisposition. The Court explained that:

> an agent deployed to stop the traffic in illegal drugs may offer the opportunity to buy or sell drugs and, if the offer is accepted, make an arrest on the spot or later. In such a typical case, or in a more elaborate "sting" operation involving government-sponsored fencing where the defendant is simply provided with the opportunity to commit a crime, the entrapment defense is of little use because the ready commission of the criminal act amply demonstrates the defendant's predisposition.

503 U.S. at 549-550. The Court rejected the government's contention that Jacobson's "ready" commission of the offense established his predisposition, however, because "[t]he evidence that [Jacobson] was ready and willing to commit the offense came only after the Government had devoted 2 1/2 years to convincing him that he had or should have the right to engage in the very behavior proscribed by law." *Id.* at 553.

This case does not raise the question of when it is permissible to infer predisposition from a defendant's ready commission of an offense. In this case, the court's conclusion that the evidence was sufficient to show predisposition was not based solely on petitioners' ready and willing commission of the offense. Instead, the court relied primarily on petitioners' conduct before the initiation of the sting operation. The court specifically cited the fact that "David Price met with Bobby Price and made the first 'downpayment' for their series of 'hits' in November, 1991, long before Bobby became a government agent." Pet. App. 33a. The court also relied on the fact that "[i]n negotiating with the FBI agents about their fees, both John and David Price made reference to payments previously given to Bobby." *Ibid.* Based on that evidence, the court concluded that the jury could reasonably find that petitioners' "disposition arose before government agents allegedly pressured them to discuss murder." *Ibid.* *Jacobson's* discussion of when government inducement may preclude an inference of predisposition from ready commission of the offense is therefore inapposite here.

c. Petitioners also contend (Pet. 13) that the decision below conflicts with *Jacobson* because the court of appeals concluded that petitioners were

predisposed to commit a less serious offense than murder for hire, and *Jacobson* requires proof that the defendant was predisposed to commit the offense of which he was convicted. To the extent that any such requirement exists, however, it was met here. While the court of appeals noted that petitioners made some statements that "suggest hesitation to go as far as murder," Pet. App. 33a, it went on to emphasize that "there are other indications of [petitioners'] readiness and willingness to have their perceived enemies maimed or killed," *ibid.*, including evidence that David Price made the first downpayment to Bobby Price for a series of "hits" long before Bobby became a government agent, *ibid.*[2]

d. Petitioners suggest (Pet. 11-12) that the decision below conflicts with *United States* v. *Hollingsworth*, 27 F.3d 1196 (7th Cir. 1994) (en banc). In *Hollingsworth*, the Seventh Circuit held that *Jacobson* requires the government to prove that the defendant was "ready and willing" to commit the crime not only in the traditional sense of having been amenable to doing so, but also in the sense of having been "so situated by reason of previous training or experience that it is likely that if the government had not induced him to commit the crime some criminal would have done so." *Id.* at 1200. There is no conflict warranting review here, however, because petitioners' convictions would be affirmed under the analysis in *Hollingsworth*. Long before the government had

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[2] Petitioners contend (Pet. 13 n.3) that the entrapment instructions were deficient in failing to require a finding that petitioners were predisposed before contact with government agents. That contention is without merit. The court's instructions (see p. 6, *supra*) track the standard for entrapment set forth in *Jacobson*.

any contact with petitioners, they sought introductions to "the right people" to kill or maim their perceived enemies, and they gave Bobby Price $2,000 for his services as go-between. By posing as "the right people," the undercover agents merely infiltrated petitioners' ongoing conspiracy. Petitioners confirmed that point when they readily and willingly hired the agents to carry out their preconceived plans, and again when they promised the agents more work in the future. Thus, petitioners were "in a position without the government's help to become involved in illegal activity" of the very type of which they were convicted. *Hollingsworth*, 27 F.3d at 1200.

2. Petitioners contend (Pet. 14-24) that the district court failed to conduct an adequate hearing on the issue of possible juror misconduct. In particular, they contend that they should have been permitted to cross-examine all the jurors, or that the court should have asked all the questions that petitioners submitted. A trial court, however, has broad discretion in determining the type of investigation to conduct in response to a claim of juror misconduct. See, *e.g.*, *United States* v. *Resko*, 3 F.3d 684, 690 (3d Cir. 1993); *United States* v. *Boylan*, 898 F.2d 230, 258 (1st Cir.), cert. denied, 498 U.S. 849 (1990). Here, the court carefully questioned each of the jurors. Moreover, in conducting that inquiry, the court drew on questions submitted by both petitioners and the government. Given the court's thorough investigation of the issue, and the need to protect the integrity of the deliberative process, see *Tanner* v. *United States*, 483 U.S. 107, 120 (1987), Fed. R. Evid. 606(b), the district court acted well within its discretion when it refused to permit petitioners to cross-examine the jurors and

when it decided not to pose every question that petitioners submitted.[3]

Although petitioners' claim purports to identify deficient procedures, it reduces to a disagreement with the district court's assessment of the jurors' credibility and impartiality. See, *e.g.*, Pet. 15-18, 23-24. The court's findings that no juror was biased against petitioners, and that Juror Number 4's de minimis contact with the FBI agent was harmless, however, are amply supported by the record. Petitioners' fact-bound challenge to those findings does not warrant this Court's review. See *Arizona* v. *Washington*, 434 U.S. 497, 513 (1978) ("compelling institutional considerations" justify appellate deference to trial judge's evaluation of juror misconduct allegations).

3. Petitioners next contend (Pet. 24-27) that the district court abused its discretion in excluding from evidence the Attorney General's Guidelines on FBI Undercover Operations. According to petitioners (Pet. 25-26), violation of the Guidelines would have been relevant to the issue of predisposition. An agency's failure to comply with its own discretionary guidelines on what methods to use in an undercover operation, however, has no bearing on the question whether the particular target of an undercover operation was predisposed to commit the offense. *United States* v. *Evans*, 910 F.2d 790, 804 (11th Cir. 1990), aff'd on other grounds, 504 U.S. 255 (1992). The district court therefore did not abuse its discretion

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[3] None of the cases on which petitioners rely (see Pet. 17-20, 22) holds that an allegation of juror misconduct entitles defense counsel to question the jurors himself or to have the court ask the jurors every question defense counsel proposes.

when it excluded the Attorney General's Guidelines on FBI Undercover Operations from evidence.

Petitioners argue that *Jacobson* indicates that the Guidelines are relevant on the issue of predisposition. Pet. 25 & n.8. In *Jacobson*, however, the Court alluded to the Guidelines for the limited purpose of supporting its conclusion that its decision would not "encroach[] upon Government investigatory activities." *Jacobson*, 503 U.S. 549 n. 2. The Court did not suggest that a district court's exclusion of the Guidelines from evidence in a case involving an entrapment defense would constitute an abuse of discretion.[4]

4. Petitioners renew their challenge (Pet. 27-29) to the validity of Sentencing Guideline § 5E1.2(i), which requires imposition of "an additional fine amount that is at least sufficient to pay the costs to the government of any imprisonment, probation, or supervised release ordered." Petitioners argue (Pet. 27) that a cost-of-incarceration fine does not further any of the purposes of the Sentencing Reform Act of 1984 and therefore violates the Eighth Amendment's prohibition against excessive fines and the Due Process Clause. That contention is without merit. The Sentencing Reform Act expressly requires a court to impose sentences that "reflect the seriousness of the offense" and "afford adequate deterrence to the criminal conduct," 18 U.S.C. 3553(a)(2), and cost-of-incarceration fines further those two goals. Accordingly, every court of appeals that has considered the

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[4] Because the Guidelines were not relevant, there is also no merit to petitioners' claim (Pet. 26) that they had a right to cross-examine FBI agents on the Guidelines in an effort to show that the agents and Bobby Price had violated them. See Fed. R. Evid. 402 ("Evidence which is not relevant is not admissible.").

question, except one, has upheld the validity of section 5E1.2(i). See *United States* v. *Zakhor*, 58 F.3d 464, 465-468 (9th Cir. 1995); *United States* v. *May*, 52 F.3d 885, 891-892 (10th Cir. 1995); *United States* v. *Leonard*, 37 F.3d 32, 39-40 (2d Cir. 1994); *United States* v. *Turner*, 998 F.2d 534, 536-537 (7th Cir.), cert. denied, 114 S. Ct. 639 (1993); *United States* v. *Hagmann*, 950 F.2d 175, 186-187 (5th Cir. 1991), cert. denied, 506 U.S. 835 (1992).

In *United States* v. *Spiropoulos*, 976 F.2d 155, 164-169 (1992), the Third Circuit held that section 5E1.2(i) is invalid. There is no need, however, for the Court to resolve the conflict created by *Spiropoulos*. That decision was not based on that court's view that Congress lacked power to authorize cost-of-incarceration fines. Rather, it was based on the court's view that Congress had not yet authorized them. 976 F.2d at 165, 169. Since the decision in *Spiropoulos*, Congress has expressly confirmed the Sentencing Commission's authority to require cost-of-incarceration fines. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 20403(b), 108 Stat. 1825 (codified at 28 U.S.C. 994(y)) ("The Commission, in promulgating guidelines pursuant to subsection (a)(1), may include, as a component of a fine, the expected costs to the Government of any imprisonment, supervised release, or probation sentence that is ordered."); see also § 20403(a)(2), 108 Stat. 1825 (codified at 18 U.S.C. 3572(a)(6)) (sentencing court imposing fine shall consider, among other things, "the expected costs to the government of any imprisonment, supervised release, or probation component of the sentence"). The conflict identified by petitioners therefore has no prospective importance.

5. Finally, petitioners contend (Pet. 30) that the district judge erred in declining to recuse himself from sentencing after he learned that one of the petitioners had allegedly threatened him. That fact-bound contention does not warrant review.

A judge must disqualify himself not only "[w]here he has a personal bias or prejudice concerning a party," 28 U.S.C. 455(b)(1); see also 28 U.S.C. 144, but also "in any proceeding in which his impartiality might reasonably be questioned," 28 U.S.C. 455(a). Because subsection (a) "deals with the *objective appearance* of partiality," *Liteky* v. *United States*, 114 S. Ct. 1147, 1156 n.2 (1994), disqualification is required "only if it appears that [a judge] harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute," *id.* at 1158 (Kennedy, J., concurring in the judgment).

In the circumstances of this case, the judge's impartiality could not reasonably be questioned. Although the judge learned that he "ha[d] allegedly been threatened," 2/9/94 Tr. 4, he knew no details about the matter, made no inquiries about it, did not seek protection, expressed no fear or concern, and manifested no aversion or hostility toward petitioners. Indeed, the judge's repeated use of the term "alleged" in discussing the issue suggests that he was not convinced that threats had in fact been made. In those circumstances, recusal was not required. See *United States* v. *Yu-Leung*, 51 F.3d 1116, 1119-1120 (2d Cir. 1995) (judge's failure to recuse after learning that defendant had allegedly threatened his life was not plain error where judge never suggested that he considered the death threats to be serious). Compare *United States* v. *Greenspan*, 26 F.3d 1001,

1005-1007 (10th Cir. 1994) (recusal required where, after learning of a possible death threat, the trial judge expedited the sentencing hearing and stated that he wanted the defendant in a federal penitentiary immediately so that he could be monitored more closely).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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